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No. 93-1883

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, guardian ad litem for VERNAIS EDWARDS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF MINNESOTA, CONNECTICUT, MASSACHUSETTS, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, THE VIRGIN ISLANDS AND VIRGINIA IN SUPPORT OF PETITIONERS

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

LAURASUE SCHLATTER*
Assistant Attorney General
445 Minnesota Street
Suite 900
St. Paul, Minnesota 55101-2127
Telephone (612) 296-7013
*Counsel of Record

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RICHARD BLUMENTHAL
Attorney General of
Connecticut

SCOTT HARSHBARGER
Attorney General of
Massachusetts

G. OLIVER KOPPELL
Attorney General of
New York

MICHAEL F. EASLEY
Attorney General of
North Carolina

THEODORE R. KULONGOSKI
Attorney General of
Oregon

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania

JEFFREY B. PINE
Attorney General of
Rhode Island

JEFFREY L. AMESTOY
Attorney General of
Vermont

ROSALIE SIMMONDS BALLENTINE
Attorney General of the
Virgin Islands

JAMES S. GILMORE, III
Attorney General of
Virginia

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Amici present this brief in support of Petitioners pursuant to Rule 36.4 of the Rules of the Supreme Court.

INTEREST OF THE AMICI STATES

The amici states file this brief because the Ninth Circuit's decision in this case deprives the states of the discretion, granted to them by Congress, to determine how to structure the Aid to Families with Dependent Children (AFDC) program within the limits of federal law. The Ninth Circuit struck down California's policy requiring non-sibling children who are AFDC claimants residing together and sharing a relative caretaker to be grouped together into a single AFDC assistance unit.[1] Relying on the doctrine of stare decisis, the Ninth Circuit held that the California case was indistinguishable from *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990), in which a similar Washington State regulation was held to violate three federal AFDC regulations. The Ninth Circuit refused to reconsider the earlier decision despite statements by the federal Department of Health and Human Services ("HHS") supporting California's position, and despite a conflicting decision regarding similar regulations from the Massachusetts Supreme Judicial Court. *MacInnes v. Commissioner of Pub. Welfare*, 593 N.E.2d 222 (Mass. 1992). The amici states have a strong interest in this issue because, after the Ninth Circuit decided this case, both the Second and the Eighth Circuits held that similar non-sibling filing-unit rules in New York and Minnesota are consistent with federal law. *See Bray v. Dowling*, 25 F.3d 135 (2d Cir. 1994),

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[1] For purposes of brevity, this rule and other similar rules and policies from other states will be referred to in this brief as the "non-sibling filing-unit rule." The "non-siblings" who fall within the scope of the rule are individuals residing in the household and choosing to apply for AFDC benefits (including the relative caretaker) who are permitted, but not required, by federal law to be part of the needy child's assistance unit. *See* 42 U.S.C. § 602(a)(38) (1988 & Supp. V 1993).

pet. for cert. filed, (Aug. 29, 1994, No. 94-5845); *Wilkes v. Gomez*, 32 F.3d 1324 (8th Cir. 1994).[2]

It is important for the Court to recognize that, because the courts in *MacInnes* and *Bray* were presented with fact situations which did not explicitly raise the issue of non-AFDC resources or income within the assistance unit, these decisions are not sufficiently broad in their reasoning to address all of the relevant federal requirements. *MacInnes*, and perhaps *Bray*, hold that the non-sibling filing-unit rule is justified by the federal law requiring a relative caretaker to use all of the AFDC resources available to her for the benefit of the entire AFDC assistance unit. These courts were not required to address an additional, equally significant basis for approving the rule. Under federal law, *any* resources and income available to a member of an assistance unit are considered to be available to all of the members of the unit. This is crucial because, once a non-sibling in the household chooses to apply for AFDC, the state is required to look to any non-AFDC income or resources of such person (e.g., part-time employment, social security payments, child support payments) in determining the needs of the entire assistance unit.

This Court should reverse the Ninth Circuit's decision in this case, and instead adopt the reasoning set forth by these amici states. This reasoning, which accurately interprets the relevant federal regulations and allows states to treat all AFDC claimants in a single household with one caretaker as one assistance unit, is consistent with the Eighth Circuit, Second Circuit, Massachusetts and North Carolina decisions, and with the long-standing interpretation of HHS.

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[2] In addition to the cases cited above, the North Carolina Supreme Court upheld that State's non-sibling filing-unit rule, reversing the North Carolina Court of Appeals. *Morrell v. Flaherty*, 428 S.E.2d 492 (N.C. Ct. App. 1993), *rev'd*, No. 203PA93 (N.C. S. Ct. Nov. 3, 1994).

STATEMENT

I. STATUTORY AND REGULATORY BACKGROUND.

AFDC is funded and administered jointly by the federal and state governments. It is based on a scheme of "cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). States participate in the program at their option, and presently all states have chosen to do so. Participating states receive federal funds for payments made to needy children and families. As a condition of receipt of these federal funds, the states are required to administer their AFDC programs in compliance with federal statutes and regulations promulgated by the Secretary of HHS. *Id.*; 42 U.S.C. §§ 601 and 604 (1988).

Congress established the AFDC program to encourage

> the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life.

42 U.S.C. § 601 (1988). "Aid to families with dependent children" is defined as "money payments with respect to a dependent child or dependent children . . . and includes (1) money payments to meet the needs of the relative with whom any dependent child is living." 42 U.S.C. § 606(b) (1988).

A "dependent child" is defined as a needy child under age 18 who has been deprived of parental support by reason of death, continued absence, or physical or mental incapacity of a parent, and who is living with a statutorily specified "caretaker relative," such as a parent or grandparent. 42 U.S.C. § 606(a) (1988).[3]

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[3] A dependent child may also include a needy child who has "been deprived of parental support or care by reason of the unemployment . . . of the parent who is the principal earner, and who is living with any of the relatives specified" in 42 U.S.C. § 606(a). 42 U.S.C. § 607(a) (1988).

If the dependent child and his relative caretaker request AFDC benefits and are found to be eligible, then they are considered an "assistance unit" and receive payments as a unit, for the benefit of the unit as a whole. *See* 42 U.S.C. § 605 (1988). As administered in most states, the payment (or "grant") increases by decreasing amounts for each member added to the unit. This incremental increase is based on the theory of economies of scale. Application of the concept of economies of scale to an AFDC household reflects " 'the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared.' " *Bowen v. Gilliard*, 483 U.S. 587, 599 (1987), *quoting Termini v. Califano*, 611 F.2d 367, 370 (2d Cir. 1979); *see also Lyng v. Castillo*, 477 U.S. 635, 638-43 (1986).

Federal law requires that the income, resources and needs of all members of an assistance unit are considered together in determining eligibility and amount of payment. 42 U.S.C. § 602(a)(7)(A) (1988). *See* 45 C.F.R. § 206.10(b)(5) (1993). A parent caretaker is required to be part of her child's assistance unit. 42 U.S.C. § 602(a)(38)(A) (1988 & Supp. V 1993). Other caretakers may choose whether or not to apply for AFDC and thus be included in the assistance unit. If a non-parent caretaker chooses not to apply for AFDC, then he is not part of the assistance unit and the assistance unit is composed only of the dependent child or children.

Under the Deficit Reduction Act of 1984 ("DEFRA") amendment to the Social Security Act, a parent of a dependent child and all dependent minor *siblings* living with the dependent child (with some limited exceptions) are required to be included in the assistance unit with the dependent child. 42 U.S.C. § 602(a)(38)(B) (1988 & Supp. V 1993). The final regulations implementing this requirement were published at 57 Fed. Reg. 30,132 (1992). Beyond this mandatory unit, states are free to determine the composition of the AFDC assistance units in their own programs, because "[t]he composition of an AFDC assistance unit is not defined in federal law." *Allen v. Hettleman*, 494 F. Supp. 854, 861 (D. Md. 1980). *See also* 57 Fed. Reg. at 30,136 (1992) (section

602(a)(38) does not require consolidation of mandatory assistance units in same household, although state may choose to consolidate units). A state plan must provide that the inclusion in the program of groups of individuals will be based on reasonable classifications designated by the state. In addition, the state must determine the need and amount of assistance for all applicants and recipients on an objective and equitable basis. 45 C.F.R. § 233.10(a)(1) (1993).

California's non-sibling filing-unit policy, like those of Minnesota, New York, North Carolina, Washington, Massachusetts and numerous other states, expands the definition of an "assistance unit" beyond the minimum composition required by the federal statute.[4] The common-sense policy reflected in these rules is that, when an AFDC caretaker is responsible for a group of dependent children in her home, the caretaker should and generally will treat the children as members of a single household. Thus, all other things being equal, the amount of the AFDC grant for a household of ten is the same, whether the household is composed of ten cousins, ten siblings or some mix of the two.

As noted above, since the states' AFDC payment standards are generally based on the concept of economies of scale, they rise in decreasing increments with each person added to the assistance unit. For example, according to the grant standards set out in Minn. R. 9500.2440, subps. 5 and 6 (1993), an assistance unit of ten in Minnesota would receive $902 per month. If the same group of ten children were treated as two separate units, one of six ($663) and one of four ($510), the total AFDC grant for the household would be $1,173. If the group were split into five sets of two siblings (each $345), the total grant would be $1,725. Thus, by splitting any given AFDC unit into more parts, the total AFDC

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[4] North Carolina and HHS conducted a survey of the states to determine how many had non-sibling filing-unit rules similar to North Carolina's. In its brief filed with the North Carolina Court of Appeals in April 1992, North Carolina stated that current figures showed that 29 states had non-sibling filing-unit policies similar to the one at issue here. Brief of the Secretary of the North Carolina Department of Human Resources, *Morrell v. Flaherty*.

grant would be increased. This scheme would result in similarly situated households, identical in numbers and in needs, receiving widely varying AFDC grants.

II. COURT CHALLENGES TO THE NON-SIBLING FILING-UNIT RULE.

The first reported challenge to a state's non-sibling filing-unit policy arose in the *Beaton* case. The Ninth Circuit panel in *Beaton* found that Washington state's non-sibling filing-unit regulation violated three federal AFDC regulations: 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1) (1993). The first two of these regulations concern what income and resources may (or may not) be considered available to an AFDC assistance unit. The third regulation governs the state's determination of whether a child has been deprived of parental support or care for purposes of determining eligibility or for assuming the availability of income. *Beaton* found that the effect of the Washington regulation was "to presume that the non-legally responsible relative [i.e., the relative caretaker or the non-sibling child] with whom the child lives is contributing to the support of the child without proof of any actual contribution." The court held that the Washington regulation violated 45 C.F.R. § 233.20(a)(2)(viii) (the "*Van Lare* regulation"),[5] "which prohibits a reduction in benefits solely because of the presence in the house of a non-legally responsible adult." It further held that the regulation violated 45 C.F.R. § 233.90(a)(1) (the "*King* regulation")[6] and 45 C.F.R. § 233.20(a)(3)(ii)(D) (the "general availability regulation")[7] "which mandate against

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[5] For purposes of easier reference, this brief will refer to § 233.20(a)(2)(viii) as the *Van Lare* regulation, referring to *Van Lare v. Hurley*, 421 U.S. 338 (1975), the decision which prompted the federal agency to promulgate the regulation. *See* 42 Fed. Reg. 6583-84 (1977).

[6] Section 233.90(a)(1) will be referred to as the *King* regulation, after *King v. Smith*, 392 U.S. 309 (1968). *See* 33 Fed. Reg. 11,290 (1968); 36 Fed. Reg. 3860, 3868 (1971).

[7] Section 233.20(a)(3)(ii)(D) will be referred to as the "general availability regulation."

presuming a non-legally responsible person is contributing to the needy child's expenses." *Beaton*, 913 F.2d at 704.

Following the *Beaton* decision, similar challenges were mounted in Massachusetts, North Carolina, California, Nevada, New York and Minnesota. The Massachusetts Supreme Court expressly rejected *Beaton* and upheld the Massachusetts non-sibling filing-unit rule, stating:

> To the extent that *Beaton v. Thompson* . . . is to the contrary, we decline to follow it. . . . [T]he *Beaton* court opined that "the effect of the regulation is to presume that the non-legally responsible caretaker relative with whom the child lives is contributing to the support of the child without proof of any actual contribution." *Id.* at 704. This reasoning overlooks the position of the judge below that the obligation of the caretaker to provide support comes from the federal law [42 U.S.C. § 605 (1988)] requirement that the caretaker use all of the grant for the benefit of everyone in the assistance unit. Since we agree with the judge that a legal obligation to support exists in these circumstances, we disagree with the *Beaton* court that the effect of such a regulation is to presume income from a "non-legally" responsible person.

MacInnes v. Commissioner of Pub. Welfare, 593 N.E.2d 222, 226 (Mass. 1992). The North Carolina Supreme Court also rejected *Beaton*. In addition, Nevada signed a consent decree, agreeing to comply with *Beaton*. *Adams v. Griepentrog*, No. CV-S-90-451 (D. Nev. consent decree filed Oct. 11, 1990).

The federal district courts in both New York and Minnesota followed *Beaton*, but were ultimately reversed by the Second and Eighth Circuits. The Second Circuit, which considered only the *King* and *Van Lare* regulations, agreed with the state that both regulations operate "only to bar any state presumption that *outside* income from non-legally responsible individuals in a household will be available to meet the needs

of dependent minors *therein*."[8] *Bray v. Dowling*, 25 F.3d 135, 143 (2d Cir. 1994) (emphasis added). *Bray* distinguished New York's non-sibling filing-unit policy, which resulted in states presuming that resources were shared within the assistance unit, from the laws challenged in the *King* and *Van Lare* cases, which "invalidated state regulations which presumed that *non-AFDC recipients* would contribute financially to AFDC recipients with whom they shared a household on the basis that absent some legal duty, such support might not be forthcoming." *Bray*, 25 F.3d at 144 (emphasis added). *Bray* recognized that "[t]he uncertainty of support that animated these cases and the federal regulations is absent here." *Id.* In addition, *Bray* accorded deference to the federal agency's interpretation of its own regulations which were at issue in the case. *Bray*, 25 F.3d at 143.

In finding that Minnesota's non-sibling filing-unit rule is consistent with the general availability and the *Van Lare* regulations, the Eighth Circuit stated:

> Section 233.20(a)(3)(ii)(D) precludes the state from counting as available to an assistance unit resources that are not actually or legally available to one of its members. Of course outside of AFDC, nonsiblings with independent resources have no obligation to share their assets, but states are permitted to consider the collective resources of an assistance unit to determine eligibility and amount of payment. This is made more clear by section 233.20(a)(2)(viii) which provides that states cannot reduce payments based on 'the presence *in the household* of a non-legally responsible individual; and the agency will not assume any contribution

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[8] The court in *Bray* addressed two additional regulations not at issue in the instant case. Those regulations, 45 C.F.R. §§ 233.10(a)(1) and 233.20(a)(2)(iii) (1993) require the standard of AFDC assistance to be applied equitably and uniformly throughout the State. The court found no violation of these requirements because "New York has chosen to premise uniformity upon identical treatment of similarly sized households receiving AFDC assistance." *Bray*, 25 F.3d at 146; *accord Wilkes*, 32 F.3d at 1330; *MacInnes*, 593 N.E.2d at 227.

> from such individual for the support *of the assistance unit*. . . . ' By its terms, the regulation addresses the assets of members of the household that are not members of the assistance unit.

Wilkes v. Gomez, 32 F.3d 1324, 1329-30 (8th Cir. 1994). *Wilkes* expressly adopted the statement in *Bray* rejecting *Beaton* because *Beaton* failed to distinguish between the AFDC caretaker legally obligated "to expend AFDC funds for the benefit of all the minor [AFDC] children in her household and a non-legally responsible individual who has no corresponding obligation." *Wilkes*, 32 F.3d at 1330, citing *Bray*, 25 F.3d at 145. Finally, like the Second Circuit, the Eighth Circuit gave the federal agency's interpretation of its own regulations substantial deference, and recognized that HHS' statements regarding assistance unit composition were both long-standing and consistent. *Wilkes*, 32 F.3d at 1329 n.6.

In the instant case, the United States District Court, bound by *Beaton*, rejected the state's arguments. *Edwards v. Healy*, No. S-91-1473 (E.D. Cal. Apr. 24, 1992). California appealed, but the Ninth Circuit refused to reconsider *Beaton*, stating that only an en banc court would have the authority to overrule *Beaton*. The court further held that California had not distinguished its case adequately to overcome the stare decisis effect of *Beaton*. *Edwards v. Healy*, 12 F.3d 154, 155 (9th Cir. 1993), *reh'g en banc denied* (Feb. 22, 1994).

III. HISTORY OF THE FEDERAL AGENCY'S SUPPORT FOR THE NON-SIBLING FILING-UNIT RULE.

Starting long before the nationwide litigation just described, and continuing past the time of the Ninth Circuit decision in this case, HHS has made a number of increasingly explicit statements regarding the broad discretion of the states to define assistance units. These statements include a 1994 Action Transmittal which focuses solely on the issues before the Court in this case; a June 1993 letter written by the Assistant Regional Administrator for Family Security in Region V of HHS; the preamble to the final regulations implementing DEFRA, 57 Fed. Reg. 30,132 (1992); a 1991

Declaration by HHS's Assistant Secretary for Children and Families, prepared in connection with North Carolina's *Morrell* case; a 1986 Action Transmittal instructing states on implementation of the 1984 DEFRA provisions; a 1980 letter from the Secretary of the Department of Health, Education and Welfare ("HEW") requested by the court in *Allen v. Hettleman,* 494 F. Supp. 854 (D. Md. 1980); and an October, 1976 memorandum from the Administrator of the Social and Rehabilitation Service at HEW. Issued in a variety of circumstances over a period of 18 years, these statements consistently recognize that states may combine non-sibling children into a single assistance unit if those children share a caretaker.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in this case disregards reasonable interpretations of the applicable law made by the federal and state agencies charged with the administration of the AFDC program. The needs of AFDC children and the difficulties responsible relatives may encounter in balancing those needs are the same regardless of whether the children are siblings. States which use a non-sibling filing-unit rule have taken the logical position that any group of a given number of children living with the same responsible relative caregiver should receive the same amount of financial assistance as any other same-sized group, regardless of how many sets of siblings are claiming AFDC.

This approach is fully consistent with the applicable law and has been approved by the federal agency which oversees state administration of AFDC. The Ninth Circuit here held that the non-sibling filing-unit rule violates federal AFDC laws which prohibit states from imputing resources or income from non-legally responsible persons to AFDC recipients. These laws have been codified in three AFDC regulations, 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D) and 233.90(a)(1) (1993).

The Ninth Circuit's reasoning is wrong. There is no provision of federal law which prohibits the common sense

approach taken by California and 28 other states. Congress and the courts have historically given states broad latitude to design their AFDC programs. HHS has promulgated implementing regulations which grant states substantial discretion to determine AFDC assistance-unit composition. The Social Security Act and the applicable regulations require a state to look to the income, needs and resources of *all* members of an assistance unit to determine the amount of AFDC to which the unit is entitled. In addition to affirming states' discretion to determine assistance-unit composition generally, HHS has stated that the "availability principle" does not apply to the determination of assistance-unit composition, including non-sibling filing-unit rules. These statements by the federal agency should be given substantial deference by this Court.

There is no basis for extending the availability principle so that it operates to prohibit the states from presuming that income and resources are shared *within* the assistance unit. To the contrary, the case law which led to the formulation of the availability principle and the promulgation of the applicable federal regulations prohibits states from imputing to an AFDC applicant or recipient income or resources from a person who is *not* an AFDC applicant or recipient.

The decision in this case relies on the Ninth Circuit's prior decision in *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990). *Beaton* is a sparse opinion which erroneously relies on *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982). In *McCoog*, the Ninth Circuit invalidated Oregon regulations that reduced the shelter component of an AFDC grant when children receiving benefits lived with non-legally responsible relatives *who were not AFDC claimants* (and thus not part of the assistance unit). *Beaton*, 913 F.2d at 703, 704. In relying on *McCoog*, the *Beaton* court failed to distinguish between the Oregon regulation requiring attribution of resources of non-legally responsible relatives who were *not* claiming AFDC from the Washington regulation requiring sharing of income and resources among AFDC recipients within the same household.

The Ninth Circuit's decision in this case robs California, and the other states in the Ninth Circuit, of the discretion to

which they are entitled under federal law to define assistance-unit composition. It is inconsistent with the law in the Eighth and Second Circuits, and in Massachusetts and North Carolina. Therefore, this Court should reverse the Ninth Circuit.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS HISTORICALLY GRANTED STATES BROAD DISCRETION IN THEIR ADMINISTRATION OF THE AFDC PROGRAM.

Congress and the courts have repeatedly recognized the importance of allowing states substantial discretion in fashioning their social-services programs, including the AFDC program. In *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 414 (1973), this Court said that states "have considerable latitude in allocating their AFDC resources, since each state is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *Id.* (*citing King v. Smith*, 392 U.S. at 318). In *Dandridge v. Williams*, 397 U.S. 471, 478 (1970), which addressed a state's plan for allocation of AFDC resources, this Court recognized that "the starting point of the statutory analysis must be a recognition that the federal law gives each state great latitude in dispensing its federal funds." The Social Security Act itself requires that a state take into account "any other income and resources of any child or relative claiming [AFDC] or of any other individual (living in the same home as such child and relative) whose needs *the State determines* should be considered." 42 U.S.C. § 602(a)(7)(A) (1988) (emphasis added). This Court "has repeatedly refused to void state statutory programs *absent congressional intent* to preempt them." *Dublino*, 413 U.S. at 413 (emphasis added). Here, not only is there no statute which shows a Congressional intent to preempt the states' discretion to determine assistance-unit composition, but section 602(a)(7)(A) explicitly permits the states to consider income or resources not only of the AFDC child and the child's relatives claiming AFDC, but also of other individuals

in the home. While it is true that the availability principle limits the states' discretion in imputing income to the assistance unit from outside the assistance unit, nothing in the availability principle case law, the regulations which followed it, nor in any statutory provision, prohibits a state from presuming that income and resources *within* the assistance unit will be shared.

II. THE NON-SIBLING FILING-UNIT RULE IS SUPPORTED BY THE FEDERAL LAW REQUIRING THE STATE TO CONSIDER INCOME AND RESOURCES AVAILABLE TO ANY MEMBER OF THE UNIT WHEN THE AMOUNT OF THE GRANT IS DETERMINED.

In upholding the non-sibling filing-unit rule, several courts have relied heavily on the obligation of the AFDC caretaker to "use all of the [AFDC] grant for the benefit of everyone in the assistance unit." *Bray*, 25 F.3d at 144, citing MacInnes, 593 N.E.2d 222, 226. When the AFDC grant is the sole resource or source of income to all of the members of the assistance unit, this obligation of the caretaker to use all of the grant for everyone is dispositive. *See* 42 U.S.C. § 605.

It is significant, however, that federal law provides even broader authority which many states use in determining the amount of assistance needed within an assistance unit. In addition to requiring that the caretaker use all of the AFDC grant for the benefit of the entire assistance unit, federal law requires the state to consider even outside (i.e., non-AFDC) income or resources available to *any* member of the assistance unit when determining the amount of the grant which an assistance unit will receive. Section 602(a)(7)(A) requires that:

> The State agency –
>
> (A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children or of any other individual (living in the same home as such child and relative) whose needs

> the State determines should be considered in determining the need of the child or relative.

42 U.S.C. § 602(a)(7)(A). Furthermore, under 45 C.F.R. § 206.10(b)(5) all of the income, resources and needs of all of the members of an assistance unit must be considered *together* in determining eligibility and the amount of payment. Thus, within an assistance unit, any income and resources available to the assistance unit as a whole must be considered by the state when determining the need of the assistance unit. This is entirely consistent with the obligation of the caretaker to meet the needs of the assistance unit as a whole with the grant provided by the state.

Consider, for example, a Minnesota household consisting of a mother and child. The monthly grant for a mother and child with no countable income in Minnesota is $437. But the mother has non-AFDC countable income of $200 per month, which reduces the amount of the grant to $237 per month. Two nieces then join the household. The nieces apply and are eligible for AFDC. Under the non-sibling filing-unit rule the nieces, the child and the caretaker are considered a single assistance unit. The AFDC grant for an assistance unit of four in Minnesota is $621 per month. But the caretaker's income of $200 per month must still be taken into account when determining this assistance unit's monthly grant. The grant is reduced by $200 per month, for a net AFDC grant of $421 per month. The total income available to the caretaker to support the household is $621 per month.

Nothing in the federal law or the non-sibling filing-unit rule requires the caretaker to actually share her income of $200 per month with her nieces. She is only obligated to spend her non-AFDC income on herself and her child. But both the federal law requiring a state to consider the income and resources of all of the members of the assistance unit and the state non-sibling filing-unit rules recognize the realities of how families, including AFDC families, live. It is unlikely that the caretaker will keep separate cartons of milk in the refrigerator for her nieces and her child. Nor will she deny a niece toothpaste because she has depleted her allotment of AFDC funds for the month. Instead, she will do what most

people who are responsible for running a household do. She will use all the resources available to her to support the family. The determination that this is how households should and do operate underlies both the federal and state laws at issue here. *Cf. Gilliard,* 483 U.S. at 600 n.14 (Congress' finding that parents using child support funds for benefit of entire family reflects reality that such expenditures benefit each member of household).

To the extent that the total AFDC grant, when viewed on a per capita basis, is less after two small assistance units are combined than it would have been had they remained separate units, this is the result of the operation of the principle of economies of scale. This well-established concept simply recognizes that, while it may be an exaggeration to say that "two can live as cheaply as one," it would be similarly incorrect to believe that it costs twice as much for two to live as it does for one. Whether the addition to the family comes in the form of a cousin or a newborn sibling, the principle is the same. The per capita expenses of a person living in a larger group should be less than those of the same person living alone or in a small group. Because there is no flow of income, but simply a recognition that there are reduced needs due to economies of scale, the non-sibling filing-unit rule in no way evades the requirements of the availability regulations.

Moreover, it must be recognized that the caretaker and her child in the above example may choose to opt out of the assistance unit. Aside from the mandatory assistance unit defined in 42 U.S.C. § 602(a)(38) (a child, parents, siblings and half or adopted siblings), no one in the household is required to apply for AFDC. Thus, in the example discussed above, if the caretaker discovers that the household, as a whole, will be better off if she and her daughter choose not to participate in the AFDC program, they have that option available to them.

Although the reasoning in *MacInnes* and *Bray* that caretakers must use the AFDC grant for the benefit of the entire assistance unit was correct, those decisions did not go far enough to address all the situations where non-sibling filing-

unit rules apply. It is important to recognize that, once assistance units are combined, the federal law *requires* states to consider all of the income and resources available to the unit as a whole in determining the monthly AFDC grant. This requirement is consistent both with the caretaker's general obligation to use AFDC resources for the needy children in her care, and with the way in which households actually operate. It is also consistent with the policy of economies of scale, which Congress and the courts have long recognized is a reasonable one for states to apply in designing their AFDC programs.

III. HHS' REPEATED STATEMENTS THAT STATES MAY EXPAND THE COMPOSITION OF ASSISTANCE UNITS BEYOND THE MANDATORY MEMBERS REQUIRED BY 42 U.S.C. § 602(a)(38) ARE ENTITLED TO SUBSTANTIAL DEFERENCE.

The federal agency's interpretation of its own regulation is entitled to substantial deference by this Court, which has stated that it will

> defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

Thomas Jefferson Univ. v. Shalala, ___ U.S. ___, ___, 114 S. Ct. 2381, 2386-87 (1994). Not only are the issues in this case complex and technical, they "involve the allocation of limited AFDC resources, [which] necessarily entails the exercise of judgment grounded in policy concerns." *Wilkes v. Gomez*, 32 F.3d 1324, 1329 (8th Cir. 1994).

The federal agency's interpretation of the regulations here is clear, consistent and long standing. In March 1994, HHS issued Action Transmittal No. ACF-AT-94-6 ("1994 AT"), which sets forth, explicitly and in depth, HHS' interpretation of the *King*, *Van Lare* and general availability regulations. The purpose of the 1994 AT was:

> To re-state the policy governing the authority of State agencies to consolidate assistance units in certain situations and to clarify that such a consolidation does not conflict with the Federal regulations that prohibit assuming the availability of income from certain persons without actually determining that it has been contributed.

Pet. App. 34.[9]

HHS also elaborated on its position regarding assistance-unit composition as recently as June 1993, after the Minnesota Department of Human Services requested clarification from the Assistant Regional Administrator for Family Security of the Region V Office of HHS regarding the state's discretion to define assistance units. The federal agency's response, part of the district court record in *Wilkes*, states that the federal agency

> has interpreted the [AFDC] program statute to allow each State the discretion to structure assistance units in such a way as to best serve the interests of the overall program in that State. Significantly, the title of the program was changed in 1962 from "Aid to Dependent Children" to "Aid to *Families with* Dependent Children." Public Welfare Amendments of 1962, P.L. 87-543, § 104(a)(1). Congress explained that this change was "[i]n line with the new emphasis on family services." S. Rep. No. 1589, 87th Cong. 2d Sess. *We believe that it is important that assistance is given to a family, not*

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[9] "Pet. App. ___" refers to the appendix to the Petition for Certiorari filed with the Court. "Am. Br. App. ___" refers to the appendix to the Brief of Amici States of Minnesota, et al.

> *only to an individual child, and that the State plays a key role in determining how that family unit is best composed.*

Am. Br. App. 5 (emphasis added).

When HHS issued final regulations in 1992 implementing the federal sibling filing-unit statute, 42 U.S.C. § 602(a)(38), the federal agency specifically addressed the issue in this case in its preamble to the regulations. *See* 57 Fed. Reg. 30,132 (1992). The preamble sets out various examples of household compositions, then discusses how they should be treated under the federal regulations. These examples explicitly permit a state to combine assistance units, even if nothing in the federal law requires that they be combined. 57 Fed. Reg. 30,132, 30,136-37 (1992). All of these examples are essentially identical to examples discussed in an Action Transmittal issued by HHS in January, 1986.[10] With the publication of the 1992 regulations, HHS formalized the interpretation embodied in the 1986 AT.

The 1991 Declaration of HHS's Assistant Secretary for Children and Families also clearly affirmed the states' flexibility in this area. HHS made the declaration in connection with litigation in North Carolina involving exactly the same issue in dispute in this case – a state's discretion to combine assistance units.[11] The HHS declaration confirms that "[s]tates are allowed the discretion to define assistance units

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[10] The Office of Family Assistance of HHS issued Action Transmittal No. SSA-AT-86-1 ("1986 AT") to assist states in proper implementation of 42 U.S.C. § 602(a)(38). The 1986 AT addresses a number of issues regarding assistance-unit composition, clearly stating that states have the discretion to combine assistance units within a household:

> [I]t is *up to the State* to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance.

Pet. App. 50 (emphasis added).

[11] *Morrell v. Flaherty*, 428 S.E.2d 492 (N.C. Ct. App. 1993), *rev'd*, No. 203PA93 (N.C. S. Ct. Nov. 3, 1994). The declaration was part of the record in the district court proceeding in *Morrell*. *Morrell v. Flaherty*, No. 91-CVS 9056, County of Mecklenburg, Sup. Ct. Div. (Nov. 27, 1991).

for the AFDC program beyond the mandatory parent/sibling composition." Am. Br. App. 3.

The idea that states have discretion to determine assistance-unit composition precedes the 1984 DEFRA amendments. In *Allen v. Hettleman*, 494 F. Supp. 854, 861 (D. Md. 1980), the district court solicited and received the views of the Secretary of Health, Education and Welfare ("HEW," predecessor to HHS) regarding Maryland's right to determine the composition of its AFDC assistance units. The Secretary responded to the court's inquiry by stating that the Maryland regulation was permissible under federal law and regulation and that

> *the composition of an AFDC assistance unit is not defined in federal law*. So too, the budgeting methods a state may use to determine the level of an AFDC payment to a family is not mandated by federal requirements. Therefore, *states are free to prescribe the composition of an AFDC assistance unit* and the budgeting method they will use for such unit.

Id. at 861 (emphasis added). Importantly, the Secretary made this statement *after* the three federal regulations at issue in the instant case were in effect. By later making certain individuals *mandatory* members of the assistance unit (in DEFRA), Congress did not divest the states of their discretion to define assistance units more broadly than the minimum required by Congress.

Even as far back as 1976, HEW stated that

> States may . . . provide for two AFDC payments in the case of a mother who is the caretaker relative for her own children and her sister's children. In such a situation, the State may establish two budget units or it may include all children in one AFDC payment. Federal matching would be available in either budgeting method.

Memorandum from HEW's Administrator of Social and Rehabilitation Service (cited in *Bray*, 25 F.3d at 142). Thus, over a long period the federal agency has consistently interpreted the

federal statute and its own regulations to allow states flexibility in determining assistance-unit composition and specifically to allow the non-sibling filing-unit rule. This interpretation is entitled to great deference by the Court.

IV. NEITHER CASE LAW NOR FEDERAL REGULATIONS ESTABLISHING THE AVAILABILITY PRINCIPLE PROHIBIT NON-SIBLING FILING-UNIT RULES.

The arguments against the permissibility of the non-sibling filing-unit rule are ill founded. First, the availability principle, as it is defined by the leading decisions of this Court, does not apply to the non-sibling filing-unit rule. In *King v. Smith*, 392 U.S. 309 (1968), this Court first articulated the availability principle of the AFDC program. In that case, the Court considered an Alabama regulation which disqualified an otherwise-eligible child from AFDC if his mother "cohabited" with a man who was not legally obligated to support him. *King* dealt with the issue of whether a man who had no legal obligation to support a child could be presumed to be that child's "substitute father" for the purpose of determining whether the child was a "dependent child" under Title IV-A. *King*, 392 U.S. at 313. The Court held that such a presumption violated the requirements as well as the purpose of the AFDC program. But the issue in *King* was limited. *King* addressed the availability principle only in terms of whether a man who did not seek AFDC assistance could be presumed to be supporting a child to whom he had no legal obligation. Furthermore, *King* examined this question solely in the context of determining the child's categorical eligibility for AFDC (i.e., whether the child was deprived of parental support), not for the purpose of determining the amount of the grant the child should receive.

In a later case, *Van Lare v. Hurley*, 421 U.S. 338 (1975), the Court held that New York could not reduce an AFDC household's shelter allowance based on the mere presence in that household of a nonpaying lodger. Like the *King* decision, the analysis of the availability principle in *Van Lare* focused on the relationship between the AFDC assistance unit and an

outsider whom the state presumed to be contributing to the assistance unit.

None of the individuals assumed to be contributing to the AFDC households in these seminal cases were AFDC claimants, nor were they members of the AFDC assistance unit. In contrast, the non-sibling filing-unit rule requires only that *eligible AFDC claimants who share a home and a caretaker* be included in a single assistance unit. Thus, while *King* and *Van Lare* do help to define "actual availability," the question of how assistance-unit composition is related to actual availability is not addressed in either of those cases.

Nor do 45 C.F.R. §§ 233.90(a)(1), 233.20(a)(2)(viii) and 233.20(a)(3)(ii)(D), the federal regulations relied upon by the Ninth Circuit, prohibit states from requiring that resources be shared among members of an assistance unit. The federal agency promulgated 45 C.F.R. § 233.90(a)(1) in response to King v. Smith.[12] That regulation provides:

> The *determination of whether a child has been deprived of parental support or care* by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is married, under State law, to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability. . . . *Under this requirement,* the inclusion in the family or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. . . .

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[12] 45 C.F.R. § 233.90(a)(1) was originally codified at 45 C.F.R. § 203.1 (1969). *See* 33 Fed. Reg. 11,290 (1968); 36 Fed. Reg. 3860, 3868 (1971); *Lewis v. Martin*, 397 U.S. 552, 555-56 (1970) (describing history of recodification of 45 C.F.R. § 233.90(a)(1)).

45 C.F.R. § 233.90(a)(1) (emphasis added). *King* dealt with the availability principle as it applies to the definition of parent for the purpose of determining whether a child is a dependent child under Title IV-A. The *King* Court found Alabama's "substitute-father" regulation invalid because it defined "parent" in a way that is inconsistent with 42 U.S.C. § 606(a). 392 U.S. at 333. The federal agency then promulgated 45 C.F.R. § 233.90(a)(1) to clarify what was meant by the statutory phrase "deprived of parental support." 33 Fed. Reg. 11,290 (1968). This provision was never intended to, and by its terms does not, restrict a state's flexibility to consolidate assistance units of persons seeking or receiving AFDC benefits.

The Ninth Circuit in *Beaton* relied on the language in the regulation which prohibits including any individual other than a natural or adoptive parent (or, depending on state law, a stepparent) "for a finding of ineligibility or for assuming the availability of income." *Beaton*, 913 F.2d at 703. But the argument that this section applies to assistance-unit composition ignores the significant language which begins the paragraph. Section 233.90(a)(1) applies only to a state's "determination of whether a child has been deprived of parental support or care." The language relied on by the Ninth Circuit is prefaced by the phrase "[u]nder this requirement," referring back to the introductory language. Thus, by its own clear terms, the entirety of section 233.90(a)(1) applies only to the state's determination of whether the child is deprived of parental support.

In a 1981 revision of section 233.90(a)(1), the last sentence of the regulation, *including* language which referred to the amount of the assistance payment, was deleted from the section. 46 Fed. Reg. 46,750, 46,768 (1981). By dropping this language from section 233.90(a)(1), the federal agency demonstrated that it did not intend the section to apply to the determination of the amount of the assistance payment. *See* 1994 AT, Pet. App. 39-40.

HHS interprets section 233.90(a)(1) only to prohibit "the state from finding a claimant ineligible because it concludes that the presence of such a ["substitute parent" or "man-in-

the-house"] should mean that the claimant is not deprived of parental support." Pet. App. 39. Thus, section 233.90(a)(1), in its current form, applies to the determination of whether a child is a dependent child under the federal AFDC statute. The non-sibling filing-unit rule affects only children who have *already* been determined to be deprived of parental support. If the non-sibling child is not needy (i.e., not deprived of parental support), the child will not be combined with the assistance unit. Given the historical background and the express language of section 233.90(a)(1), there is no support for the proposition that the regulation's prohibition on attribution of resources or income applies to AFDC recipients within the unit itself.

The second regulation relied upon by the Ninth Circuit, the *Van Lare* regulation (section 233.20(a)(2)(viii) (1993)), applies only to assumption of contributions by non-legally responsible individuals who are not eligible AFDC applicants or recipients. The federal agency promulgated this regulation in response to *Van Lare v. Hurley*. *See* 42 Fed. Reg. 6583-84 (1977). The *Van Lare* regulation requires that a state plan:

> Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and section 233.51 of this part.[13]

45 C.F.R. § 233.20(a)(2)(viii) (1993). In *Van Lare*, the question before the Court was whether, in light of the availability principle, the presence of a non-paying lodger in an AFDC home could be used to lower the grant of an AFDC assistance unit. The lodger did not seek AFDC benefits, nor was he shown to contribute to the support of the family. Nevertheless, the state's regulations presumed that he was contributing

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[13] None of the exceptions listed in the regulation are relevant to the issues in this case.

to the family's shelter costs and automatically deducted a pro rata share of the shelter allowance to the AFDC unit based on the lodger's presence, even if he contributed nothing. The *Van Lare* Court stated: "[T]he Social Security Act precludes treating a person who is not a natural or adoptive parent as a breadwinner 'unless the bread is actually set on the table.' " 421 U.S. at 346 (*citing Lewis v. Martin*, 397 U.S. 552, 599 (1970)). When assistance units are combined in accordance with a non-sibling filing-unit rule, the children involved are not treated as breadwinners, presumed to be putting bread on the table. Instead, they are simply being treated as what they are – needy children who share a home and a relative caretaker who uses all of the resources legally available to her for the benefit of all the children in her care.

HHS has stated that it promulgated the *Van Lare* regulation

> to prohibit the State from assuming (without actually determining) that there will be available to the dependent child(ren) in an assistance unit the income or resources of a person who lives in the *same household*, but is *not* a member of the *assistance unit* claiming benefits and is not legally responsible to support those who are. This is the intent of the regulation because the program does not assume that a person living in the household, but not a member of the assistance unit, will contribute his/her income or resources. In contrast, the statute and regulations expressly require that all income and resources of all members of the assistance unit will be counted.

Pet. App. 37-38 (emphasis added). Thus the principle of actual availability, as it was formulated in this Court's decisions and in the regulations which arose from those cases, does not address whether states can require AFDC recipients who share a household and a caretaker to also share AFDC resources.

The third availability-principle regulation on which the Ninth Circuit relied in *Beaton* is the general availability regulation which states:

> To the extent not inconsistent with any other provision of this chapter, income and resources are considered available *both* when *actually available and when* the applicant or *recipient has a legal interest* in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.20(a)(3)(ii)(D) (1993) (emphasis added). The general availability regulation requires that states may look only to the income or resources that are actually or legally available to at least one member of the assistance unit. As long as they are available to at least one member of the unit, they are considered together with all other resources available to the members of the unit to determine the needs of the unit. This is consistent with the underlying rationale for the availability principle.

This Court in *Heckler v. Turner*, 470 U.S. 184 (1985) recalled the origins of the availability principle:

> The availability principle traces its origins to congressional consideration of the 1939 amendments to the Act. At that time, some members expressed concern, specifically with regard to the old-age assistance program, that state agencies not assume financial assistance from potential sources, such as children, who actually might not contribute. Shortly after passage of the 1939 amendments, the Board adopted a policy statement applicable to various aid programs, including AFDC. The statement cautioned the States that in effecting the new statutory directive to take into account a recipient's "income and resources," they must ensure that any such income or resources "actually exist," be not "fictitious" or "imputed" and "be actually on hand or ready for use when it is needed."

Id., 470 U.S. at 200 (citations omitted). The concern of the Court and Congress with respect to the availability principle was that states not be permitted to presume that resources were available to AFDC applicants or recipients when the states had no means of requiring that that support be provided. But the State *can* reasonably assume that one caretaker

receiving AFDC on behalf of several children in one household will share the benefits fairly among them, and that many necessary expenditures will be made on behalf of them all as a group. HHS' own interpretation of section 233.20 (a)(3)(ii)(D) confirms that states need not determine whether the resources of the members of the assistance unit are actually or legally available to one another:

> [Section 233.20 (a)(3)(ii)(D)] is intended to preclude the State from counting as available to the assistance unit income or resources that are not actually or legally available *to one of the members* of the unit. Once income or resources that are available to each member of the assistance unit are counted, the income and resources of *all* the members of the assistance unit are considered together to determine the need, eligibility and amount of payment of a unit pursuant to section 402(a)(7)(A) of the Act and section 206.10(b)(5) of the regulations.

Pet. App. 38 (emphasis added).

HHS defines "assistance unit" in a manner that is consistent with the way family households operate. It requires that the "income, resources and needs" of the members of an assistance unit be "considered as a unit for purposes of determining eligibility and the amount of payment." 45 C.F.R. § 206.10(b)(5) (1993). Under the rule required by the Ninth Circuit, a caretaker could receive differing amounts per child, depending on the unit to which the child belonged. In such a situation, how would the caretaker allocate shared expenses such as rent and utilities? And would she be compelled to spend more on some of the children each month for food and clothing than she spends for other children living together? If she did not, would she be accused of using money "available" for one child to benefit another? It is difficult to imagine that the caretaker could operate her household in that way or, more importantly, that it would be desirable.

Section 206.10(b)(5) was published as part of the implementation of section 602(a)(38). If the federal agency had intended to limit the definition of assistance unit to those individuals required to be included under section 602(a)(38),

it stands to reason that it would have done so expressly when it promulgated the regulations implementing that section. 57 Fed. Reg. 30,132, 30,157 (1992). Instead, section 206.10(b)(5) is a very broad definition which does not limit whom a state may include in an assistance unit. The non-sibling filing-unit rule attributes resources within a unit consistent with the definition of assistance unit. Thus, the non-sibling filing-unit rule does not improperly presume availability of resources.

V. THE NINTH CIRCUIT'S RULINGS IN EDWARDS AND BEATON CONFLICT WITH FEDERAL MANDATORY AS WELL AS PERMISSIVE ASSISTANCE-UNIT COMPOSITION RULES.

Federal law already requires certain people who do not have legal responsibility for one another to share AFDC and other resources if they live together and choose to receive AFDC, and permits states to require other combinations. The Ninth Circuit's holding invalidating the non-sibling filing-unit rule would also invalidate examples of both permissive and mandatory assistance unit consolidation published by the federal agency in the Federal Register.

The preamble to the final DEFRA regulations published in July 1992 gives examples of situations where states may combine assistance units which are *not required* to be combined under federal law:

> [I]n States without laws of general applicability, if a dependent child and his mother (caretaker relative), stepfather, and stepbrother are living in the same household, DEFRA requires that the assistance unit must include only the dependent child and his mother. If application is made on the stepbrother's behalf, *depending on State policy*, he and his natural parent *could receive benefits as part of the same assistance unit*, or in a separate unit.
>
> In States with laws of general applicability [making stepparents financially responsible for stepchildren], the stepparent must be included in the assistance unit, since he or she is considered the

> same as a natural parent; however, stepbrothers and stepsisters of the dependent child need not be included in the assistance unit.
>
> A mother, her child, her second husband (who is disabled) and his child live in the same household. Neither parent has adopted the other parent's child or is viewed as a parent of the other parent's child under State law of general applicability. There may be two separate AFDC units – the mother and her child and the husband and his child. (In this situation, section 402(a)(38) does not require the consolidation of assistance units, *though the State may choose to do so.*)

57 Fed. Reg. 30,132, 30,136-37 (emphasis added).

These combinations of assistance units, which states may require, will result in AFDC recipients who are not legally responsible for one another being required to share resources. If the principle of actual availability applied to the determination of assistance-unit composition, then the state options described in these examples would violate that principle just as the Ninth Circuit found the non-sibling filing-unit rule does.

In addition, HHS actually *requires* combination of assistance-units in some cases where there is a member of a household who would be a member of two assistance units within the household. *See* 45 C.F.R. § 233.20(a)(1)(iii) (1993). Thus, for example, if the woman and her second husband described in the preamble example above have a child together, the family *must* be combined into a single assistance unit. 57 Fed. Reg. 30,132, 30,136-37 (1992). This is so even though the woman's first child and the man's first child are step-siblings with no legal obligation to one another and even though the woman and the man have no legal obligation to their respective stepchildren. According to the Ninth Circuit's reasoning, this combination would violate the availability principle because one child's incremental increase in the AFDC grant is lower than it would otherwise be, because of the inclusion in the assistance unit of another child for whom the first child has no legal responsibility.

All of the situations described above are more similar to the circumstances covered by the non-sibling filing-unit rule than they are to the cases, such as *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982), relied on by recipient plaintiffs in non-sibling filing-unit litigation and the Ninth Circuit in *Beaton*. In *McCoog*, a non-legally responsible person who was *not* an AFDC claimant was presumed to be contributing income or resources to the AFDC assistance unit. In contrast, in the situations described in the DEFRA regulation preamble, the federal law requires, or gives the states discretion to require, that individuals who *are* AFDC claimants and who share a household, share their resources and income. Like the federal examples, the non-sibling filing-unit rule requires sharing of resources only among AFDC claimants who share a household. This is not a violation of the availability principle, which prohibits states from presuming that income or resources of a non-responsible person in the home, but outside of the assistance unit (that is, a person who is not an eligible AFDC applicant or recipient) will be available to a member of the unit.

The Ninth Circuit has not distinguished the situations described in the above examples from the circumstances of the recipients in this case. The federal agency has plainly stated that the states have discretion to determine assistance-unit composition. Moreover, while defining assistance unit in a manner which requires that members of the unit share resources, the federal agency has explicitly given examples of discretionary assistance-unit combinations which would clearly result in the required or assumed sharing of resources among persons who are not legally responsible for each other. HHS expressed no concern that these definitions of assistance units would result in a violation of the availability principle, because the availability principle simply does not apply to determinations of assistance-unit composition.

CONCLUSION

The issue presented here is important to the states, and to the administration of federal-state public assistance programs. The Ninth Circuit's decision conflicts with two other circuit court decisions, with the decisions of two states' highest courts, and with the views expressed by the federal agency on many occasions. For these reasons, the amici states respectfully request that the decision of the Ninth Circuit be reversed.

November, 1994

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General of
Minnesota

LAURASUE SCHLATTER*
Assistant Attorney General
445 Minnesota Street,
Suite 900
St. Paul, Minnesota
55101-2127
Telephone: (612) 296-7013
*Counsel of Record

APPENDIX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 91 CVS 9056

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

LORETTA MORRELL, As Guardian Ad Litem for JONATHAN LONG and JOSHUA LONG, individually and on behalf of all others similarly situated.	DECLARATION OF JO ANNE B. BARNHART
Plaintiffs,	
vs.	
DAVID T. FLAHERTY, in his official capacity as Secretary of the North Carolina Department of Human Resources and MARY DEYAMPERT, in her official capacity as Secretary of the North Carolina Division of Social Services,	
Defendants.	

I, Jo Anne B. Barnhart, hereby declare as follows:

1. I am the Assistant Secretary for Children and Families of the United States Department of Health and Human Services ("HHS"). In that capacity, I have overall

responsibility for the administration of the Aid to Families with Dependent Children (AFDC) program under title IV-A of the Social Security Act.

2. The purpose of this affidavit is to describe the filing unit provision at section 2640 of the Deficit Reduction Act of 1984 (DRA). "Filing unit" refers to members of a household whose needs are considered in determining the household's eligibility for an amount of AFDC assistance.

3. Section 2640 of DRA, which added section 402(a)(38), 42 U.S.C. section 602(a)(38) to the Act, requires that the parents and siblings of an AFDC child who are themselves dependent children must be included in the filing unit and have their income and resources considered available to the unit.

4. In DRA, Congress enacted the first mandatory requirement regarding composition of the filing unit for AFDC assistance. Prior to 1984, there was no requirement that all co-resident family members be included in the filing unit for AFDC purposes. A family applying for AFDC assistance could, therefore, exclude from the filing unit those family members with income which would reduce or terminate the family's AFDC benefits.

5. Effective October 1, 1984, section 2640 of DRA requires certain individuals living in the same household to file for AFDC as a unit. Included are:

- parents, and
- blood-related or adoptive brothers and sisters who are:

- under the age *selected* by the State for AFDC payments (age 18 or 19)
- deprived of parental support or care by reason of death, continued absence from the home, physical or mental incapacity of a parent, or unemployment of a parent
- "living with" a specified relative.

Notwithstanding the above, certain parents and siblings must be excluded from the assistance unit because they are not eligible for assistance under other provisions of the Act.

6. When an individual is required to be in two or more assistance units, these units must be consolidated. Federal policy as enunciated in SSA-AT-86-1 allows States to establish policy on the number of assistance units in other household situations.

7. States are allowed the discretion to define assistance units for the AFDC program beyond the mandatory parent/sibling composition.

8. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31 day of August, 1991.

/s/ Jo Anne B. Barnhart
Jo Anne B. Barnhart
Assistant Secretary
for Children and Families
Department of Health and
Human Services

(LOGO) DEPARTMENT OF HEALTH & HUMAN SERVICES

Administration for Children and Families
Chicago Regional Office

Refer To: KD5C

June 29, 1993

John Petraborg, Assistant Commissioner
Family Self-Sufficiency Administration
Minnesota Department of Human Services
444 Lafayette Road
St. Paul, Minnesota 55155

Dear Mr. Petraborg:

This is in response to your June 18, 1993 letter requesting clarification of Federal requirements governing composition of assistance units for the Aid to Families with Dependent Children (AFDC) program. You set out three different case situations and asked if the State may require all of the individuals in each of the households described to be included in consolidated assistance units.

Federal law does not specify how assistance units must be composed except in two respects. First, section 402(a)(38) of the Social Security Act and section 206.10(a)(1)(vii) of the implementing regulations at Title 45, Code of Federal Regulations, require that the unit must include, if living in the same household and otherwise eligible for assistance, any natural or adoptive parent or (where the State has a law of general applicability holding him/her legally responsible to the same extent as

a natural parent) a stepparent, and any blood-related or adoptive brother or sister, with a limited exception. Second, section 233.20(a)(1)(iii) of the regulations provides that, when an individual who is required to be included in the assistance unit pursuant to the first requirement is also required to be in another assistance unit as well, those assistance units must be consolidated.

In this regard, the State completes a two step process to determine the eligibility of an assistance unit. First, the State determines who must be in the assistance unit pursuant to Federal requirements or State requirements that are not inconsistent with the Federal ones. Second, and only after the composition of the assistance unit has been determined, the State determines the income and resources of all the individuals in the assistance unit and their need, as authorized by section 402(a)(7)(A).

Apart from the specific Federal requirements relating to how an assistance unit must be composed, the Administration for Children and Families (ACF) has interpreted the program statute to allow each State the discretion to structure assistance units in such a way as to best serve the interests of the overall program in that State. Significantly, the title of the program was changed in 1962 from "Aid to Dependent Children" to "Aid to Families with Dependent Children." Public Welfare Amendments of 1962, P.L. 87-543, § 104(a)(1). Congress explained that this change was "[i]n line with the new emphasis on family services." S. Rep. No. 1589, 87th Cong. 2d Sess. We believe that it is important that assistance is given to a family, not only to an individual child, and that the State plays a key role in determining how that family unit is best composed.

This discretionary authority of the State is described in the January 13, 1986 AFDC Action Transmittal No. SSA-AT-86-1 (pp. 3-4):

> When an individual is required to be in two or more assistance units living in the same household, these units must be consolidated. . . .
>
> Outside of this policy, it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance.

More recently, the preamble to the final rule on the AFDC provisions of the Deficit Reduction Act of 1984 (57 FR 30136 dated July 8, 1992) expressed the flexibility States have in composing the assistance unit. After describing a case situation involving two potential assistance units living in the same household, the preamble states:

> If application is made on the stepbrother's behalf, depending on State policy, he and his natural parent could receive benefits as part of the same assistance unit, or in a separate unit. Accordingly, we have reworded this example from the preamble to the interim final regulation to indicate that there may be one or two assistance units in such cases, depending on State policy.

The analysis of a different case situation on the same page includes the comment, "In this situation, section 402(a)(38) does not require the consolidation of assistance units, though the State may choose to do so."

In light of ACF's long-standing principle that, in the absence of specific requirements to the contrary, States have discretion in determining whether or not to consolidate assistance units, State policy would govern in all of the three case situations you described in your letter. In case #1, therefore, the State could require the consolidation of assistance units in accordance with established State policy. It would make no difference whether the caretaker relative were on the AFDC grant or not. In case #2, the State policy again would determine whether the household would include two assistance units or only one. Similarly, in case #3, the State may require a consolidated assistance unit in accordance with its policy, regardless of whether or not the caretaker relative could qualify for AFDC.

In another question you asked if the State's discretion in these cases is dependent upon a case-by-case determination that the income of each of the members of the consolidated assistance unit is actually available to the others. The procedures for establishing the composition of the assistance unit in any given case must comply with Federal requirements and applicable State policy. There is, however, no Federal requirement that State policy in this regard be governed by such a case-by-case determination.

Finally, another approach set forth in your letter would be to automatically combine into a single assistance unit all of the AFDC-eligible children residing in the same household and having a common caretaker relative. Such a policy would be acceptable as long as the caretaker relative retains the right to choose whether or not to apply for benefits, and thus include in the assistance unit

those persons who are not required to be included under the Federal provisions cited above.

You referred in your letter to several other regulatory sections in connection with your question about the composition of assistance units. Those regulations relate to issues of coverage and eligibility, need and amount of assistance, and deprivation of parental support, but do not address how assistance units must or may be composed. Under section 233.10(a)(1), a State may not select groups of individuals to be included in the program or establish eligibility conditions that "exclude individuals or groups on an arbitrary or unreasonable basis." It is not arbitrary or unreasonable to include in the same assistance unit the caretaker relative and all of the dependent children living in the same household for whom he/she is caring, if the State elects to do so. The same increment in assistance is granted for each additional dependent child in a unit composed in this way as is granted for any other family into which additional dependent children benefitting under the program are introduced. The program assumes that the family cost of caring for more children is higher, but by a lesser incremental factor per child. The same assumptions are made about the income, resources and needs of all the individuals in this assistance unit as are made in the case of every assistance unit in the program.

It is important to remember that Federal law contemplates that all the assistance granted to a family with dependent children will be used or allocated by the caretaker relative for the approximately equal benefit of each child in the assistance unit. Thus, the program assumes that a child will receive the benefit of the family assistance payment, not just the increment awarded for that additional child. If the State has reason to believe that

this is not happening, there is Federal authority for the State to take steps to correct the situation (42 U.S.C. 605). Therefore, it is proper to assume that all of the family assistance grant is legally available to benefit each child in the unit proportionally.

Section 233.20(a)(3)(ii)(D) provides that, when determining the income and resources of individuals in the assistance unit, income and resources are considered available both when actually available to a member of the unit and when the member has a legal interest in a liquidated sum and the legal ability to make it available for support and maintenance. This regulation is intended to preclude the State from counting as available in the assistance unit income or resources that are not actually or legally available to a member of the unit. It was not intended to require that the State determine whether every element of the income and resources of every member of the assistance unit is actually or legally available to every other member of the unit. In practice, States do not expend the administrative resources to make such an intra-unit determination; and Section 402(a)(7)(A) of the Act does not require it.

Section 233.20(a)(2)(viii) provides that the money amount of need will not be reduced "solely because of the presence *in the household* of a non-legally responsible individual; and the agency will not assume any contribution *from such individual for the support of the assistance unit* [with certain exceptions]" (emphasis added). As with the preceding regulation, this is intended to preclude the State from counting as available in the assistance unit income or resources that are not actually or legally available to a member of the unit just because there lives in the household a person who is not a member of the assistance unit

and who is not legally responsible for members of the unit.

Finally, you referred to section 233.90(a)(1) which provides that, *when the State is making the determination about whether a child has been deprived of parental support or care,* the State will consider as a "parent" for this purpose only the child's natural or adoptive parent or the stepparent married to his/her natural or adoptive parent if such stepparent is legally obligated under state law of general applicability to support the child. Specifically, a "substitute parent" or "man-in-the-house" may not be considered for this purpose of assuming the availability of parental income for support if he/she does not meet the terms of the section. The regulation is intended to prohibit considering as the supporting parent a person who is not legally so. It is *not* intended to preclude the State from counting, pursuant to 42 U.S.C. 402(a)(7)(A), the income of any individual who is a member of the assistance unit, but is not a "parent" legally obligated to support a child.

We hope you find this information helpful. If you have any additional questions, please contact Mr. James McCullum, AFDC Program Manager, at 312-353-3266.

Sincerely,

/s/ Kay Willmoth
Kay Willmoth
Assistant Regional
Administrator
for Family Security